Brief of Petitioners for Certiorari

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United States Supreme Court

OCTOBER TERM, 1899.

No. 187.

GEORGE W. GROSSMAN AND HERMAN SIEBECKER,
Petitioners and Appellees,

vs.

WILLIAM BURRILL ET AL.,
Respondents and Appellants.

BRIEF FOR PETITIONERS.

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Supreme Court of the United States

OCTOBER TERM, 1899.

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Petitioners,
(Respondents in Court below,)

vs.

WILLIAM BURRILL and others, owners of the bark KATE BURRILL,
Respondents,
(Libellants in Court below.)

BRIEF FOR PETITIONERS.

Statement.

In this case, this Court, in January, 1899, granted a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit, to review a decree rendered by that Court in favor of the libellants, which reversed a decree of the District Court of the United States for the Southern District of New York, dismissing the libel with costs.

The libel was *in personam*, filed to recover from Crossman & Brother, the present petitioners, fifty-three days' demurrage, for delay in discharging and receiving a cargo of lumber at Rio Janeiro; under a charter party of the *Kate Burrill*, entered into between the libellants and respondents March 7, 1893. The respondents answered in the District Court and some testimony was taken (Record, pp. 10–27).

To portions of the answer the libellants filed exceptions. These were overruled by the District

Court, and upon the whole record as thus presented a decree was entered dismissing the libel January 16, 1895. From this decree an appeal was taken to the United States Circuit Court for the Second Circuit. That Court gave the libellants leave to amend their libel. Crossman & Brother filed an amended answer. The libellants excepted to the 14th, 15th and 16th articles of this answer on the ground as to each that the same "is insufficient in law to constitute a defense." The exceptions to the 14th and 15th articles were sustained. The exception to the 16th article was overruled (p. 38).

Testimony was taken in the Circuit Court of Appeals upon the remaining issues (pp. 63-94). A decree was rendered in favor of the libellants for the amount demanded in the libel, without interest, but with costs. The defences set up by the articles of the answer thus excepted to, are these:

1. That under the provisions of the charter party the liability of the charterer for demurrage ceased upon the execution and delivery of bills of lading to the consignees' agent (Fourteenth Article).

2. That the delay at Rio Janeiro in unloading the vessel was caused by a state of war prevailing there between the insurgents and the Government of Brazil, which made it impossible for the vessel to discharge and for the consignees to receive the cargo within the lay days (Fifteenth Article).

3. That the agents of the libellants accepted a certain sum at Rio Janeiro in satisfaction for all claims under the charter party (Sixteenth Article).

The Circuit Court of Appeals and the District Court agreed in holding that the cesser clause set up in the 14th article of the answer did not apply, because the bill of lading did not give to the shipowner a lien for demurrage. The District Court held that the defence of *vis major* set up under the 15th article of the answer was a sufficient defence.

On this point the Circuit Court of Appeals disagreed with the District Court.

Both Courts held that the defence of accord and satisfaction was sufficient in law. The Circuit Court of Appeals held that it was not sufficiently proved.

The case is reported in the District Court, 65 Fed. Rep., 104.

In the Circuit Court of Appeals, 69 Fed. Rep., 747, 16 C. C. A., 381, 35 U. S. App. 608, 62 U. S. App. 368.

In this brief it will be more convenient to consider first the validity of the defence of *vis major*. This is the point on which the learned Courts below differed.

The charter party (dated March 7, 1893) is printed at pages 5 and 6 of the record. The bill of lading is at page 9.

The lumber which composed the cargo had, before the charter was made, been sold by W. H. Crossman & Brother, the charterers, to the Companhia Industrial do Brazil. The contract was made by cable in December, 1892. The bill of lading is dated May 5, 1893. The price was $28 per thousand feet, including cost, freight and commissions, (p. 13, p. 21). The freight was deducted from the invoice (p. 27), and was paid in Rio by the Companhia to Phipps Bros. & Co., the agents of libellants (pp. 63-94). The amount of the invoice was paid by a draft, drawn by the charterers upon a London bank against a letter of credit, issued to the charterers, for account of the Companhia (Record, pp. 13-14).

In due course this draft must have been taken up by the Companhia. We hear nothing more of it.

It had been from the first distinctly understood that the shipment was at the request and on account of the Companhia. It cabled to the charterers December 12, 1892: "Ship in accordance with our cablegram of December seventh" (p. 21).

POINTS.

First.

Defence of Vis Major.

The 15th article of the amended answer alleges:

Fifteenth.—And further answering respondents allege upon information and belief that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libellants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received. That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy, and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in said delay, and recognized the necessity therefor.

The Circuit Court of Appeals held that this defense was insufficient in law, on the ground that the charter party contained an absolute agreement by the charterers to discharge the cargo in question, within a certain time, at all events. The clauses claimed to contain this agreement are:

"Cargo * * * to be discharged at port of destination at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted.

"Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written

notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent ($59 46/100) fifty-nine 46/100 dollars U. S. gold, or its equivalent, per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent."

The radical error in the opinion of the Circuit Court of Appeals is in their failure to consider:

(1.) That the clause as to discharging is a mutual agreement binding both upon shipowner and consignees. The ship must discharge. The consignee must receive.

(2.) That the only provision in reference to the liability for delay in the reception of the cargo is that already quoted; which charges the charterers, not absolutely, but only in case of their *default* or that of their agent.

The exception to the Fifteenth Article was therefore not well taken. It should have been overruled. The respondents were entitled to judgment upon it, in their favor.

I.—These allegations established a case of mutual inability on the part of both vessel and consignee. No precise number of lay days is fixed by the charter. "The lay days are to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part or agent" (p. 5). If it was impossible to discharge cargo, the vessel could not be said to be ready to discharge it. It was equally impossible for the consignees to receive it. Under such circumstances there is no liability for damages against either party. "Delivering cargo is as much the duty of the shipowner as of the merchant."

Ford *vs.* Cotesworth, L. R., 4 Qu. B., 127; Affd. on Appeal, 5 *Ibid.*, 544.
Cunningham *vs.* Dunn, 3 Com. Pleas Div., 443.

In Ford *vs.* Cotesworth the Court of Appeals say (L. R., 5 Q. B., 547):

"The defendants have to provide lighters and the plaintiffs to assist in putting the goods over the side of the ship, and the plaintiffs were as much prevented from doing their part as the defendants."

And BLACKBURN, J., said in the Queen's Bench (p. 133):

"Delivery of the cargo is as much the duty of the ship-owner as of the merchant."

To the same effect are

Dahl *vs.* Nelson, 6 App. Ca., 38.
Carsanego *vs.* Wheeler, 16 Fed. Rep., 248, 253.
The *Spartan*, 25 Fed. Rep., 44, 51.

The Captain knew that it was his duty to discharge the cargo. Hime testifies (p. 66):

"The captain of the vessel, Thomas Wilson, did complain that he could not discharge the vessel as fast, or in accordance with the Charter Party."

II.—There is no liability for demurrage where the vessel is prevented from receiving cargo by the authorities at the port at which the cargo is to be taken on board. Under such circumstances the ship is excused.

White *vs.* Steamship Winchester Co., 23 Scottish, L. R., 342.

The reasoning of this case is equally applicable to a failure on the part of the ship to discharge the cargo. Many of the authorities referred to by the advocate for libellants are considered, and it is held that they have no application to a case where the inability to handle the cargo is caused by *vis major*.

Vis major is a valid defense in all actions upon contract unless it appear that there was an abso-

lute agreement to perform at all events. This Court held it a defense in an action for rent.

Gates *vs.* Goodloe, 101 U. S., 612.

III.—Apart from the question already argued, it is clear upon the allegations of the answer that there was no default on the part of the charterer or his agent. Wherever the delivery of goods is prevented by a superior force which the contractor cannot control or prevent, he is excused.

Geismer *vs.* Lake Shore & Michigan Southern R., 102 N. Y., 563, 571.

At page 571 the Court say:

"Here, upon the facts, which we must assume to be true, there was no *default* on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty, but they were prevented by mob violence, which the defendant could not by reasonable effort overcome."

IV.—But libellant insists that the word "*default*" means omission, and that defendants are liable, at all events, for an omission to receive the cargo, whatever the cause.

Default is defined in the Century Dictionary to be:

1. "A failing or failure; an omission of that which ought to be done; neglect to do what duty, obligation or law requires.

* * * * * *

3. A fault, an offense, a misdeed, a wrong act."

Abbott Law Dict., Vol. I., p. 356, defines it:

"The neglect or omission of a duty, or failure to perform an obligation."

It is thus defined by Lord Justice Bowen *in re* Young & Harston's Contract, 31 Ch. Div., 168, 174:

"Default is a purely relative term, just like

negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

And at page 173, Sir J. HANNEN says:

"Our judgment, therefore, is that where a man knowing that some act has to be done by him on a particular day, goes away, in disregard of that obligation, he is guilty of default."

Plainly the Court would have held that if he had been prevented by revolutionary violence, he would not have been guilty of default.

In Caffarini *vs.* Walker, 9 Irish Rep., Common Law, 431, 437, "default" is thus defined by FITZGERALD, J.

"'Default' would seem to embrace every failure by the defendant to perform his contract, *unless prevented by superior force, over which the defendant had no control*, such as stress of weather."

If libellant could show an express agreement in the charter that the consignee would take the cargo away at all hazards, his omission to do so might perhaps be called a "default." But in this case it was as much the duty of the owner to discharge the cargo as it was of the consignee to receive it. The sailors would fear the shot and shell of the ironclads as much as the longshoremen. A mutual inability cannot be called the "*default*" of the charterer or his agent.

Libellants' argument really gives no effect to the word "default of the said party of the second part or agent." They construe the charter party as if these words were omitted. But they were not omitted. The Court will therefore give them effect, and if the allegations of the answer are true it is manifest that the "detention" was by act of the public enemy, and not by "default" of the charterers or their agent.

V.—All contracts should have a reasonable construction, with reference to the circumstances of the case, and the probable intention of parties. When a word used is ambiguous, these considerations should determine the meaning to be given to it by the Court.

It has been shown that the word "default" may mean either mere omission or a positive fault. The latter is its natural and obvious meaning. Who can doubt that the parties used it in the latter sense? Libellants seek to charge respondents not for their own fault, but for that of the consignees who were the vendees of the lumber. What reason would there be for an absolute undertaking by respondents to become liable at all events for a failure to discharge cargo in a remote port, over which they had no control? Libellants' captain was on the spot. It was he who could urge and expedite the discharge. On the other hand, the cargo was to be received, not by respondents' agent, but by their vendee. All this was known when the contract was made. The parties must, therefore, have understood that the charterers would be liable only for delay caused by their own fault.

In Bailey *vs.* DeCrespigny, L. R. 4, Q. B., 180, the Court say (p. 185):

"Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.

The word impossible in such cases is not used in a strict mathematical sense, but with reference to the course of business and its practical conduct.

In Dahl *vs.* Nelson, 6 App. Ca., 38, the Court says (p. 53):

"In matters of business, a thing is said to be im

possible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost."

To the same effect is Price *vs.* Hartshorn, 44 N. Y., 94.

In this case it was held that in order to warrant such construction of a carrier's agreement as to increase his common law liability, and make it an absolute agreement to deliver at all events, the contract "ought to be clear and capable of but one construction, unequivocally and necessarily evincing that such was the intention of both parties" (p. 99).

The Court further held that such an agreement would not be implied from a contract to deliver cargo "in like good order as it was received by correct measure or weight in the customary way without delay," but that under such a contract the carrier was not liable for a loss occasioned by the "act of God."

This limits Harmony *vs.* Bingham, on which libellants rely.

VI.—Another clause of the charter party throws light on the construction of the lay-day clause (p. 6):

"Vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers."

It is argued by libellants that this clause makes the charterers guarantors of the safety of the designated anchorage. Not so. This clause qualifies the demurrage clause. It must be held to have been inserted with reference to the conditions which might prevail at Rio, and to provide that the discharge need not go on unless the anchorage ground should continue safe.

An analogous case is

Carlton S. S. Co. *v.* Castle Mail Packets Co. [1898] A. C., 486; Affg [1897] 2 Q. B., 485.

There the charter party provided that the steamer was to "load in the customary manner (Sundays and holidays excepted) always afloat." It turned out that the state of the tides was such that she could not for several days after the loading had begun continue to take on cargo and remain afloat. It was held by the House of Lords, affirming the judgment of the Court of Appeal, that the charter must be construed with reference to this condition of the harbor, and that the charterer was not liable for not providing a berth where the ship could remain "aways afloat." In other words the obligation which would otherwise have been upon the charterer was held to be qualified by the clause referred to.

VII.—This construction of the charter party is not inconsistent with the case most relied on in the Court below.

Sixteen hundred tons of nitrate of soda (15 U. S., App. 369; S. C., 10 C. C. A. 115; 61 Fed., 849).

There the language of the charter party was essentially different. That provides: The *Charterers* "shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid lay days as follows: Thirty working lay days for loading, to commence 24 hours after her inward cargo or unnecessary ballast is finally discharged. * * * And for each and every day's detention by default of" the charterers, they should pay demurrage.

The charterers were to load. The demurrage claimed was for failure to load. This was directly caused by their inability to get delivery of nitrate which they had bought. The remote cause was the revolution.

Here, then, was an express agreement limiting the time for loading, and a failure to load within that time by the party whose duty it was to load. Moreover, there was no violence preventing loading.

At page 376 (15 U. S. App.) the Court say :

"When the master of the vessel demanded the cargo, the charterers had none. Their cargo had been contracted for, but had not been delivered to them. They could not obtain possession of it. But there was no interference upon the part of the Chilian Government or upon the part of any armed force to prevent their obtaining possession of the cargo, or handling or moving the same, or placing it within reach of the vessels' tackle."

Even here Judge Ross dissented. But how radically different the two cases. In the case at bar, the agreement fixing time fixes it for discharging, which was the duty of *libellants*.

Moreover, the word "default" might well include the failure of charterers to get a cargo which they had agreed to furnish. But it does not include the case of prevention by physical force from taking cargo away. In the one case there is no cargo to load. The question of *vis major* does not arise. *Causa proxima, non remota spectatur.* In the case at bar the proximate cause was the actual firing between the vessels of war and the forts in the harbor. It is an abuse of language to call that *the default of the charterer.*

VIII.—The other cases cited by the Circuit Court of Appeals do not support the proposition for which they are cited.

In Waugh *vs.* Morris, L. R. 8 Q. B., 202, the charterer sent the ship to a wharf at which discharge was prohibited. There was no objection to discharge in the river into another vessel, which was done. The delay was clearly the charterer's fault. The word "default" was not used.

In Cargo *ex* Argos, L. R. 5 P. C., 134, the clause read (pp. 136, 161) :

"The goods to be taken out within twenty-four hours after arrival or pay £10 10s. a day demurrage." The word default was not used.

In Davies *vs.* McVeagh, 4 Excheq. Div., 265, the agreement was absolute to pay demurrage if the vessel was detained more than nineteen days. The word "default" was not used.

The same is true of Lees *vs.* Yates, 3 Taunt., 387.

In Postlethwaite *vs.* Freeland, 5 App. Ca., 599, the word "default" did not occur in the charter party. Lord Blackburn (p. 618) quotes from Abbott on Shipping to the effect that where the charterer has absolutely engaged that the ship shall be discharged in a certain time, he is liable if she is not. This proposition is not disputed. But when the obligation to pay demurrage is made by the charter to depend upon the charterer's *default*, there is not an absolute engagement.

In Grant *vs.* Coverdale, 9 App. Ca., 470 (like the Nitrate case in the Ninth Circuit) the real cause of the delay was that the charterer had no cargo to put on board. It was held no defense that he was prevented by frost from transporting the cargo by canal to the place fixed for loading.

In Budgett *vs.* Binnington, 25 Q. B. Div., 320, the language was (p. 321): "*In no case* should more than seven running days (Sundays excepted), be allowed for unloading." It was held that a strike was no defense, although it prevented the shipowner as well as the consignees from doing his part in the discharge of the ship. The decision was put wholly upon the "*absolute*" language of the charter.

And now to turn to the only case cited, in which a clause existed, similar to the present:

Davis *vs.* Wallace, 3 Cliff, 123; Fed. Ca., 3657, Vol. 7, p. 182.

In this case the consignee ordered the ship to a crowded wharf. The discharge was delayed in consequence. It was held that this was caused by the "default" of the consignee.

In the case at bar no such facts appear. The article excepted to alleges that "libellants were

prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason *of the act of the public enemy*," &c. Indeed Davis *vs.* Wallace is favorable to respondents, for it held that the charterers were not liable for a certain portion of the delay, in which the captain acquiesced. In the case at bar the article excepted to alleges (p. 50):

"That the captain of the said vessel, and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in said delay, and recognized the necessity therefor."

IX.—The Court below, in disposing of this part of the case, entirely overlooked one essential element. The agreement is to pay demurrage for "every day's detention by default of the said party of the second part or *agent*." Whatever default existed was on the part of the second vendees of the lumber. The ship was taken alongside their wharf and the lumber discharged there (p. 66). As the Circuit Court of Appeals say in their final opinion (p. 96):

"As a matter of fact the consignees were not agents for the appellees (petitioners); they were the purchasers of the cargo."

The clause in question must certainly be strictly construed. How then can petitioners be charged for the default of those who confessedly were not their agents?

Second.

Cesser Clause.

The facts relating to the cesser clause are as follows:

The charter party was made in New York, March 7, 1893, between libellants, managing owner of the

Kate Burrill; and the petitioners, doing business under the name of W. H. Crossman & Brother (p 5). The whole vessel is chartered for a voyage from Pensacola to Rio Janeiro. Before this charter was made and in December, 1892, the cargo of lumber to be carried had been sold by the petitioners to the consignee in Rio (p. 13, Ex. 3, p. 26). When the vessel was loaded the lumber was "billed" or invoiced to the consignee, the Companhia Industrial do Brazil (p. 13).

The material clause of the charter is as follows (p. 6):

"The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterer's favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterer's responsibility to cease when the vessel is loaded and bills of lading are signed."

Bills of lading were signed by the captain at Pensacola, May 5, 1893 (p. 9). They acknowledged shipment by defendants of lumber to be delivered at Rio "unto order or to their assigns," they paying freight "for the said lumber as per charter party dated 7th March, 1893, and average accustomed."

The only object of the bills of lading was to enable respondents to attach them to a draft for the purchase price. This was drawn against a letter of credit issued by a bank in London in favor of the Companhia Industrial (*Ibid*, pp. 24–25). When the draft was paid the bill of lading became unimportant.

I.—The error in the Courts below was twofold.

(*a.*) They failed to discriminate between cases

like the present where the delay was in discharging, and the discharge was not made by the charterer, and cases where the delay was that of the charterer in loading.

As for example, in

Klink *vs.* Radford [1891], 1 Qu. B., 625,

the charterers were sued for damages caused by delay at the port of loading. This was the charterers' own fault. It was held that the cesser clause did not relieve them from liability, not only because no lien for damages caused by such delay was provided for in the bill of lading, but also because the amount of the damage was unliquidated.

(*b.*) They treatedthe case as if it arose between the charterer and a *bona fide* holder for value of the bill of lading; whereas the controversy, so far as the existence of the lien for demurrage was concerned, was between the purchaser of the cargo who bought it before any bill of lading was issued, and the shipowner. It may be conceded that the authorities cited in the Court below do hold that "where the provision for cesser of liability is accompanied by a stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers were enabled to create, is not equivalent to the liability of the charterers."

It is obvious from this statement of the rule that the Court had in mind the case of a lien created by a bill of lading, existing against the owner of a portion of the cargo shipped by a particular ship, and his transferee for value and without notice. In such cases the sole contract, so far as the owner of the goods is concerned, is contained in the bill of lading, and the Courts hold tkat inasmuch as it was the fault of the charterer that this lien is not coextensive with that sought to be created by the charter party, the liability of the charterer for the difference still remains.

In Hanson *vs.* Harold [1894], 1 Qu. B., 612, the ship was re-chartered. The difference between the freight called for by the original charter and that called for by the re-charter grew out of the fact that the first was a lump sum, and the second was so much per bushel. The oats forming the cargo shrunk during the voyage to England. It was held that the original charterers were liable for the difference in question, notwithstanding the cesser clause. The original charter gave the privilege of re-chartering the vessel at any rate of freight "without prejudice to this agreement."

This case was undoubtedly well decided upon its own facts. But other cases of equal authority have held that upon facts like those in the case at bar, the lien created by the original charter party remains. It follows necessarily that upon the test stated by the Court below, the lien given by the charter party was not extinguished by the issue of the bill of lading. It therefore remained when the vessel arrived at Rio Janeiro.

McLean *vs.* Fleming, 2 H. L. Sc. App., 128.

In this case the charter gave a lien on the cargo for all freight, dead freight and demurrage. The bill of lading made no mention of dead freight or demurrage. It was held by the House of Lords, affirming the Court of Session, that as between the owner of the ship and the persons for whom the charter party was effected, the lien remained and that the issue of the bill of lading when the cargo was shipped did not impair this lien.

S. P. Gledstanes *vs.* Allen, 12 Comm. Bench, 202.

In this case the original charter was for a lump sum and a lien for this sum was given by it. Goods were shipped in Penang at a rate per cwt. which amounted to less than the lump sum. The goods were shipped by the charterers to their agents in London for sale. It was held that these agents were not entitled to the goods until they paid the

lump sum, and that it was not sufficient for them to tender the freight called for by the bill of lading. The Court says that it would be otherwise if the bill of lading had been endorsed for value, and the claim had been made by a *bona fide* endorsee.

II.—In the case at bar the charter gave respondents a lien upon the cargo for demurrage (p. 6). How then has this lien been divested? What is there in the bill of lading which shows an intent on the part of both contracting parties to divest it? The bills of lading were drawn in New York by the petitioners. They were prepared and sent to Pensacola for signature by the Captain. The bill of lading is on one of their printed forms (p. 15, Marg., p. 25). Can it be supposed for a moment that the charterers, having effected a charter giving a lien for demurrage, would immediately draw a bill of lading with the intention of relinquishing such lien? If any person were a party to this action who could rightfully allege that the bill of lading contained the whole contract between the charterers and the consignees, the petitioners might not be allowed to deny that it did. But in a suit between the original parties, or their assigns or vendees, where no new rights of a *bona fide* holder for value, and without notice, intervene, the charter must control.

As the lien for demurrage remained, the cesser clause applied the remedy of the shipowners against the charterers ceased when the vessel was loaded and bills of lading were signed, and their sole remedy was to enforce the lien against the cargo and its consignee.

It was part of the contract that the goods should be shipped to the vendee in South America. The manner of shipment and the terms upon which the shipment was to be effected, were necessarily left to the vendors. No complaint was made of these terms by the vendee. It appears distinctly from the testimony of the Treasurer of the

Companhia Industrial do Brazil, Hime, who was examined on commission, and from the letters put in evidence by the libellants, that the terms of the charter party were known to them all, and were discussed in Rio Janeiro. At page 66, Hime says the captain did mention something with regard to demurrage, "and I replied to him that in conformity with his charter party he had to deliver cargo on shore, and as he had contracted to discharge the same (that is going alongside the wharf instead of doing the discharging into lighters) I had nothing to do with it."

So in the letter written by the libellants to their agents in Rio Janeiro, they say (*Ibid.*, page 94):

"We note by the charter party that there is no exception clause covering these occurrences, and it is just possible the consignees' cargo are liable."

III.—This view of the construction of the contract is supported by a consideration of the clause as to lay days (*ante.*, p. 5). They are to commence from the time the vessel is ready to receive or discharge cargo. Demurrage is payable "day by day." For charterers' delay in furnishing cargo they could be made liable at once. For delay of the consignees in receiving the cargo, they could be made liable at once. The Captain has power to enforce his claim against them by taking advantage of the lien on the cargo for demurrage. For this reason charterers' liability for demurrage ceases when the vessel is loaded and bills of lading are signed.

IV.—The conduct of the parties is always cogent evidence of the construction to be given to their contracts.

Insurance Co. *vs.* Dutcher, 95 U. S., 269.

At page 273 the Court say:

"The practical interpretation of an agreement

by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

Chicago *vs.* Sheldon, 9 Wallace, 50.
General Mut. Ins. Co. *vs.* Sherwood, 14 How. U. S., 362.
Woolsey *vs.* Funke, 121 N. Y., 87, 92.
Reid *vs.* Sprague, 72 N. Y., 457, 461.
Nicoll *vs.* Sands, 131 N. Y., 19, 24.

In this case their conduct at Rio shows that no claim was made by anybody that the bill of lading had superseded the charter party so far as the lien was concerned. On the other hand the claim was made that the violence of the revolution was a sufficient excuse for the delay in the discharge of the cargo.

Hime, the treasurer of the Companhia, the consignee, so testifies, (p. 67):

"All I can say is that I am exceedingly astonished and surprised that such a suit should be brought against the charterers of the vessel, as by the terms of the charter-party, it is conclusive that once the cargo is on board and the bills of lading signed, the charterer's responsibility ceases, the captain having lien on the cargo for freight and any and every other claim."

October 11, 1893, libellants write their agents in Rio, making a claim against the Government of Brazil and suggesting one against the consignees (p. 94). The agents reply that there is no claim against the Government, and that they have told the captain "that he should look to his consignees to make the claim on the owners of the cargo" (*Ibid.* p. 94). His attention was thus drawn to his rights, and he should have asserted them.

Third.

Accord and Satisfaction.

It is not disputed that the consignees of the cargo, the Companhia Industrial do Brazil, settled the ship's accounts with her agents, Phipps Brothers & Co., at Rio, and paid the latter the amount shown by the account rendered, which was remitted to libellants and received without objection.

The Circuit Court of Appeals held that this settlement was not binding, and could be reopened, because the claim for demurrage was not specifically included in the settlement.

This was error.

1.—The claim was presented and discussed at Rio. The facts bearing upon it were disputed.

Edwin E. Hime was a merchant in Rio Janeiro (p. 65), and director and treasurer (*thesoureiro*, p. 92) of the Companhia Industrial do Brazil, the consignee of the vessel and cargo (p. 66).

He testifies that the *Kate Burrill* went alongside the wharf of the vendees of the lumber who had the saw mill, and that "the said owners of the saw mill had sufficient storage to stow the whole of the cargo as fast as delivered by the vessel" (p. 66). The captain made no complaint on this score (p. 66).

The captain of the vessel, Thomas Wilson, "did complain that he could not discharge the cargo as fast, or in accordance with the charter party, owing to prohibitory orders on the part of the government, there being a revolution against the government at the time, and firing in this particular locality being exceedingly heavy, and injuring life and property. This complaint was made to me, and I replied to it that I could not help him in the matter, and that he had to obey the government's orders as I had to" (p. 66). The captain made no mention of "there being no room for storing the cargo, nor that they could not get the lumber clear of the saw mill, or that they were not

selling their lumber. As far as I can recollect, there was no other vessel there " (p. 66).

Wilson, the captain, and Hime both testify that a question arose about demurrage. The captain testifies in substance as follows :

I made no claim upon the consignees of the cargo for demurrage. I did tell them that I intended to claim demurrage. "They said on account of the revolution I couldn't claim any demurrage." I had nothing to do with the collection of freight. That was collected by Phipps Brothers & Co. (p. 77). I spoke to Phipps Brothers & Co., the agents of the ship, sometimes, as to how the ship was discharging. "I said that the ship ought to get demurrage for detaining her so long in port after her lay days were up." I said that to the manager in Phipps' office. He made no reply (p. 79).

"As soon as our lay days were up I went to the consignees and told them they would have to pay demurrage, and they said we couldn't claim any demurrage on account of the revolution" (p. 79). I furnished no information to Phipps & Co. to enable them to send their account to the assignees of the cargo (p. 79-80). I knew that our charter party called for demurrage, so much a day, day by day (p. 80). I said to Phipps Brothers, 'The consignees ought to pay the demurrage for detaining the vessel so long.' They said they didn't know" (p. 80).

William Burrill, one of the libellants, and one of the owners of the *Kate Burrill*, was called as a witness. He does not deny that Phipps Brothers & Co. were agents for the ship in Rio Janeiro, or that they collected and remitted to him the freight less the charges. He writes them October 11, 1893, the following very significant letter (p. 94) :

"We presume the delay and extra cost of provisions and labor, &c., will be a very serious additional expense for which the Government of Brazil should be liable, in which case we hope you will claim for us the utmost dollar. We note by the C/Party that there is no exception clause covering

these occurrences, and it's just possible the consignees' cargo are liable."

The answer to this is dated November 17, 1893, eleven days before the discharge of the cargo was completed (p. 91,) and makes the following statement (p. 94):

"Since writing on 16th ulto. we are in receipt of your favor of 11th idem.

"There is absolutely no claim against the Government that could be made good for loss occasioned by delays, &c., in consequence of the present revolutionary troubles, and every branch of trade is suffering severely without any prospect of redress.

"We saw Captain Wilson a day or two ago when he told us he had still about 2,000 pcs. on board and waiting for his consignees to take them away. It is, we understand, most difficult to get labor, and many vessels are lying for weeks unable to discharge for want of men. We fear Capt. Wilson will not be able to collect any demurrage in these times, but have told him that he should look to his consignees to make the claim on the owners of the cargo."

II.—Phipps Brothers & Co. notified the Companhia "that they were not to give the captain any money, and that the accounts of the vessel had to be liquidated with them (Mess. P. Bro. & Co.) and not with the captain" (p. 66).

It is further proved by Hime that an account was rendered by him to Phipps Brothers & Co. for the amount due under the charter party, and that the amount shown by it to be due was paid and received in full settlement of all claims under the charter party (p. 67).

The account rendered by the consignee to Phipps Brothers & Co. is at page 69, and is marked Exhibit A. It is a duplicate of the account received from them by the libellant Burrill (p. 81), which is marked Libellant's Exhibit 3 (p. 92). He also received an account current from them, showing

their collections and remittances on account of the *Kate Burrill* (p. 81 ; Ex. 4, p. 93).

These facts show that Phipps Brothers & Co. were the general agents in Rio Janeiro for the libellants in all matters relating to the *Kate Burrill*. The rule applicable to such a case is well settled.

1 Am. and Eng. Encyclopædia of Law, 2nd Ed., p. 1022.

"A general agent for the management of the business of the principal has an authority coextensive in scope with the business. He must necessarily possess and exercise the same power and authority that his principal could if present."

This proposition is abundantly sustained by authority.

Watteau *vs.* Fenwick, 1 Q. B. (1893), 346.

Hubbard *vs.* Ten Broeck, 124 Pa., 291.

Cummings *vs.* Sergeant, 9 Metc. (Mass), 172.

Bergenthal *vs.* Fiebrantz, 48 Wis., 435.

The same rule was applied to contracts made by the cashier of a bank in

Minor *vs.* Mechanics' Bank, 1 Pet., 46.
Bridenbecker *vs.* Lovel, 32 Barb., 9.

The question is whether what the agent did was "in the course of his employment;" not whether it was specifically authorized.

New Orleans Co. *vs.* Hanning, 15 Wall., 649.

Baltimore Trust Co. *vs.* Hambleton, 40 Lawy. Rep. Ann., 317, 238.

The position of a general agent is certainly not inferior to that of a master in a foreign port. The rule as to his authority is well stated by Kay,

Law of Shippers and Seamen, Sec. 400, p. 283 (2d Ed.):

"He has authority in a foreign port to settle accounts for freight, demurrage and delay and all such matters."

To the same effect are

The Edward H. Blake, 63 U. S. App. 507, 92 Fed., 202.
Alexander *vs.* Dowie, 1 Hurlst. & N., 152.

Baron MARTIN (p. 156):

"WILLES, J., on the trial held that of necessity the captain had authority to settle all such matters (lay-days and demurrage), and that business could not be carried on unless the captain's agreement under such circumstances was binding. I concur with him in thinking that the captain must necessarily have authority to make such settlements, otherwise persons having to make payments abroad would be placed under insuperable difficulties."

In the case at bar the question is whether an agent, charged with the general management of a ship's business, and amongst other things to collect the amount due under the charter party, is authorized to liquidate this amount. If such an agent is not authorized to make such liquidation it is obvious that this can be made only by the express authority of the principal. As pointed out by Baron Martin such a rule would place persons having to make payments abroad under insuperable difficulties.

III. —One reason for the rule on this subject is the injustice that would be done to parties dealing with the shipper, if there was no one present who could settle controversies relating to her voyage.

In the present case the charter party gives the vessel "an absolute lien upon the cargo for all freight, dead freight, and demurrage" (p. 6). The

Circuit Court of Appeals has held that the bill of lading is not as extensive as the charter; that under its terms there would be a lien only for demurrage caused by the actual neglect of the consignee (p. 56), and that under the charter, *vis major* at Rio Janeiro was no defense to the claim for demurrage (p. 58). The learned District Judge held otherwise. Certainly a question upon which learned Judges have differed was debatable, and therefore a fair one for settlement.

Moreover, according to the captain's testimony, the failure to discharge the cargo in time was, in fact, caused by the neglect of the vendee of the lumber to whom the consignee directed him to make delivery (p. 74). He says as to the negligence of the consignees' agent:

"There wasn't enough water to get into the dock" (p. 74). I made objection to the slowness of the discharge of the cargo to the consignees. "They told me as soon as that other vessel got out, they would take the cargo out as fast as we could discharge her." I was ready and able to discharge the cargo faster than the consignees received it. "They hadn't warehouse room to put the cargo away from the ship." The wharf "was pretty well piled up with lumber by the sawmill." I complained again to the consignees respecting the suspension of the discharge of the cargo. "They said there was no room to put the lumber away on account of the trouble. They couldn't get the lumber clear of the sawmill. They were not selling their lumber. When the other vessel was there the place was filled up. There was no place to put it" (p. 75).

If this testimony is true, it is plain that the captain could have enforced his lien upon the cargo for demurrage. If such lien had been enforced, there is no reason to doubt that he would have compelled a settlement. In any case no attempt was made to enforce the lien for demurrage. Instead of this, the ship's agents presented an account which was paid in full, and the ship went away.

There was laches on the part of the captain and ship's agents in the failure, under the circumstances, to claim and enforce a lien, and they ought not now to be allowed to enforce the present demand against innocent consignors.

Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96.

If the libellants or their agents had acted promptly, as above shown, it is altogether probable that the respondents would have had some remedy against the consignees, which is now lost.

Penn Mutual Co. *vs.* Austin, 168 U. S., 685, 698.

IV.—The libellants accepted the remittance from Phipps Brothers & Co. without objection, and so far as appears, have never repudiated it in any way. When this payment was received by the libellants they received a copy of the statement rendered by the consignees (p. 81). The correspondence at page 94 shows that libellants then had full information as to the facts. Under these circumstances their receiving the remittance without objection was a ratification of whatever their agents had done.

Palmerton *vs.* Huxford, 4 Denio, 166.

V.—The amount due in Rio Janeiro under the Charter Party, was unliquidated. It was uncertain whether there was a valid claim for demurrage, and if any, for how many days it was payable. It was uncertain as to what charges could properly be deducted from this amount. The claims on both sides are therefore unliquidated.

Nassoiy *vs.* Tomlinson, 148 N. Y.) 326.

Where this is the case, the acceptance of a smaller amount than that actually due in satisfac-

tion of the whole amount due, is a good accord and satisfaction.

Bofinger *vs.* Tuyes, 120 U. S., 198.
United States *vs.* Child, 12 Wall, 232.
Fuller *vs.* Kemp, 138 N. Y., 231.

In the latter case the party receiving the check kept it, but wrote that he accepted it as part payment only. The maker thereupon notified him that the check was sent as payment in full. It was held that under these circumstances the protest was unavailing to the payee, and that his using the check amounted to an accord and satisfaction.

To the same effect is Davenport *vs.* Wheeler, 7 Cowen, 231.

In this case the Court say:

" Having violated the contract (suppose on both sides) the matter rested in compromise. * * * The debt was unliquidated in its nature, but by the acts of the parties it was liquidated and paid. They ought not afterwards to be allowed to go into evidence upon it.

Fourth.

Account Stated.

When the business in Rio Janeiro was concluded an account was rendered to Phipps Brothers & Co. for the amount due the ship. This account was accepted by them and no objection appears to have been taken to it before the filing of the libel. The libel itself does not contain any allegations apt to satisfy the Court that this account stated should be opened. There is no allegation of fraud or mistake. Under these circumstances the account stated should not be opened. Not being opened, it is a final settlement of all matters in difference under the charter party.

There is some confusion in the cases owing to the failure to discriminate between an account stated, as evidence of a balance, to recover which suit is brought, and an account stated as a defense to a suit. It is often said in reference to the first class of cases that the account can be opened for fraud or mistake. But no authority has been found in which, where an account has been stated, and a balance appearing to be due has been paid in full, the party receiving the payment has been allowed to open the settlement thus effected, upon proof that an item which ought to have been included in the account was not included in it, or that upon a proper construction of the contract he was entitled to more than was allowed him by the account.

Laycock, *vs.* Pickles, 4 Best & S., 497.

In this case Mr. Justice BLACKBURN thus states the rule (p. 506):

"The stating of the accounts itself was a sufficient consideration to support this action. * * * It is not necessary in order to make out a real account stated that the debts should be debts *in presenti*, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had really been paid down on each side; and the balance is recoverable as if money had really been taken in satisfaction; subject to this, that where some of the items are such that if they had been actually paid, the party paying them would have been able to have recovered them back as on a failure of consideration, the account stated would be invalidated."

It cannot be contended that the claim for demurrage was not included in the settlement. It has been already shown that the validity of this claim was fully discussed at Rio Janeiro between the various parties. The facts were well known to them all. There can, therefore, be no ground for

claiming mistake under such circumstances. The account will not be opened.

Wilson *vs.* Frisbee, 57 Ga., 269.
Quinlan *vs.* Keiser, 66 Mo., 603.
Linville *vs.* State, 130 Ind., 210.

In the case cited by the Circuit Court of Appeals (Perkins *vs.* Hart. 11 Wheat., 237), the items sued for arose outside the contract, respecting which the settlement had been made. In the case at bar they are claimed under that contract.

Fifth.

The decree of the Circuit Court of Appeals should be reversed and that of the District Court affirmed, with costs.

EVERETT P. WHEELER,
Advocate for Petitioners.

No. 187, 26

Reply Brf. of Wheeler for C

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Supreme Court of the United States.

OCTOBER TERM, 1899.

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No. 187.

GEORGE W. CROSSMAN AND HERMAN SIELCKEN,
PETITIONERS,

vs.

WILLIAM BURRILL ET AL.

REPLY FOR PETITIONERS.

FIRST.

The counsel for Burrill *et al.* (libellants below) treat the case as if it came here solely on the exceptions to the fourteenth, fifteenth, and sixteenth articles of the answer. They overlook the fact that they have a decree which, if sustained at all, must be sustained upon the evidence. This varies in important particulars from the allegations of the articles excepted to. Such is often the case.

1. The fourteenth article of the answer is silent as to all the facts anterior to the shipment. Even if the exception to it, as it stands, is well taken, the consequence does not follow that libellants are entitled to judgment on the issues

joined by the other articles of the answer which were not excepted to.

2. The evidence on these issues shows clearly the following facts:

(*a.*) The cargo of lumber was bought and paid for by the Companhia Industrial before it was shipped or the bill of lading was issued (pp. 12, 13, 20, 21, 26, 27).

(*b.*) The bill of lading was used solely as collateral to secure a draft drawn for the purchase-money, which was paid in due course (pp. 14, 15, 17).

(*c.*) The vendee (The Companhia Industrial) knew of the charter-party, recognized that its provisions as to demurrage were binding on it, but claimed that there was no liability for demurrage, because the delay was caused by revolutionary violence (pp. 66, 67).

(*d.*) The captain claimed that the delay was caused by the negligence or fault of the second vendee, the Berrogam sawmill (pp. 66, 74, 79, 80).

(*e.*) The captain delivered the lumber without insisting on his lien. The agents for libellants (Phipps Bros. & Co.) allowed this to be done and took no steps to enforce the lien (pp. 80, 94).

(*f.*) The charterers were without fault. They had no control either over the discharging or receiving the lumber.

SECOND.

On these facts the law is:

1. The lien created by the charter-party remained, notwithstanding the omission of the bill of lading to express the lien, because there was no *bona fide* purchaser for value

who could claim exemption from the lien created by the charter.

Principal Brief, second point, pp. 14–20.

2. Whether the vendees were liable *in personam* for the demurrage is immaterial. The cases cited on that point are irrelevant. The question was of lien and of the captain's right to refuse delivery of the cargo until he was paid demurrage.

3. If the captain's testimony is true that the delay was caused by the fault of the vendee, the captain had a lien for damages for detention in the nature of demurrage, even if there were no claim for demurrage under the express agreement.

4. The captain waived the lien by surrendering the lumber.

Bags of Linseed, 1 Black, 108.

5. The cesser clause applies and releases the charterer by its express terms. The exception held by some authorities to be implied when lien for demurrage is released does not apply to the facts of this case.

6. Even if this were otherwise, the liability of charterers was like that of sureties, so far as demurrage at the port of discharge was concerned. Their liability, if any, was for the fault or omission of another. The captain therefore owed them a duty to enforce the lien. Having failed to do this, and in fact released the lien, he discharged the charterers.

EVERETT P. WHEELER,
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